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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 277

THE UNITED STATES, PETITIONER

v.

MORRIS ABRAMS AND HOWARD ABRAMS, INDIVIDUALLY AND AS CO-PARTNERS D/B/A CURTIS KEY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit, entered in the above cause on May 19, 1952.

OPINIONS BELOW

No opinion was rendered by the district court. The opinion of the court of appeals (R. 19-23) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1952 (R. 19). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the Renegotiation Board had power to fix at 6% the interest to which the Government was entitled on excessive profits withheld from the Government after the date set in the Board's demand for payment, or whether the interest rate was discretionary with the court in which the United States might bring suit.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Second Renegotiation Act, Title VII, Revenue Act of 1943, 58 Stat. 78, Act of February 25, 1944, 50 U. S. C. App. 1191(c), (e), read as follows:

> § 403(c) (2) Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by the Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive

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> profits actually paid to him; or (E) by any combination of these methods as is deemed desirable [50 U. S. C. App. § 1191(c)]
>
> § 403(e)(1) * * * The filing of a petition under this subsection [relating to the proceedings before the Tax Court to redetermine excessive profits] shall not operate to stay the execution of the order of the Board under subsection (c) (2). [50 U. S. C. App. § 1191(e)]

The War Contracts Price Adjustment Board on October 6, 1944, issued a regulation (Renegotiation Manual § 626.2(3); 9 Fed. Reg. 12847, § 1606.626 (b)(3)) reading as follows:

> Interest at the rate of 6% per annum accrues upon the amount determined as excessive profits to be eliminated less the tax credit, if any, from and after the date fixed in the demand for payment.[1]

STATEMENT

Representatives of the War Contracts Price Adjustment Board (hereinafter called the Board) gave respondents notice of proceedings to determine their excessive profits under the Renegotiation Act for the fiscal year ending January 31,

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[1] Earlier publicity had been given the requirement of 6% interest when the approved forms for bilateral agreements and unilateral orders, which contained provisions requiring the payment of interest at 6% per annum, were published in the Federal Register on July 28, 1944, 9 Fed. Reg. 9117, 9118.

The regulation in the text is applicable in the instant case. It followed the established pattern of the regulations issued earlier under the Renegotiation Act of 1942 as published in the Joint Renegotiation Manual of the Joint Price Adjustment Board, § 622.

1944. Following such proceedings, a unilateral determination and order of the Board's Chairman, dated August 3, 1945, and forwarded to respondents on that day, fixed respondents' excessive profits at $72,500.00, less adjustment for taxes. (R. 4-7.) On October 15, 1945, no review having been requested, the Board notified respondents that the determination had been adopted as its own, and made demand for repayment of the excessive profits, less applicable tax credits. Respondents were informed that interest would accrue at 6% per annum from October 30, 1945. (R. 8-9.)

Respondents having failed to repay the excessive profits, the United States filed suit in the Northern District of Ohio on February 13, 1950, for the excessive profits (less applicable tax credits and less a small amount withheld from an amount due respondents), with interest at 6% until the date of payment (R. 2-4). Respondents' answer raised a question as to special amortization, subsequently waived, and proposed limiting the interest rate to 2½% on the ground that the value of the use of the money to the United States did not exceed that figure (R. 9-10).

While the Government's motion for summary judgment (R. 11) was under advisement, respondents tendered the amount of the principal, reserving the rate of interest for decision (R. 12). The district court entered judgment on February 19, 1951 for $6,348.14, representing interest at 3% to the date of payment (R. 12). No opinion was

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written. An appeal was taken from the denial of interest at 6% (R. 13, 14).

The court of appeals affirmed, holding that the district court had discretion to fix the interest rate, whereas the Board was without authority to regulate it (R. 19-23). Because of the Government's delay in filing suit and the respondents' prompt payment of the principal thereafter, the court of appeals reasoned, the district court was warranted in limiting the interest to 3%, the rate at which the Government could borrow money. Moreover, the court concluded (R. 23), "As the amount of interest was discretionary with the court, the fact that no specific reason for its action is given is immaterial."

REASONS FOR GRANTING THE WRIT

1. In denying the Board's power to regulate the interest payable to the Government on excessive profits retained by a contractor after their return has been demanded, the decision below is, as the court recognized (R. 23), in square conflict with the decision of the Court of Appeals for the Third Circuit in *United States* v. *Philmac Mfg. Co.*, 192 F. 2d 517.[2] And the issue which has led to these conflicting decisions is an important one. As of July 1, 1952, there were 468 unsettled claims by the Government for recovery of excessive profits, involving principal amounts totaling over $50,000,000, of which approximately 200 are now in litiga-

[2] In accord with the decision below, though the issue was not so sharply crystallized as it is here (see *United States* v. *Philmac Mfg. Co.*, *supra*, at 520), are *United States* v. *Bonnell*, 180 F. 2d 145, 148 (C. A. 9), and *United States* v. *Star Const. Co.*, 186 F. 2d 666, 669 (C. A. 10)).

tion. These claims, arising under the Second Renegotiation Act, pose the question presented here as to the Board's power to fix the rate of interest. While this question remains in doubt, incentives to voluntary payment of the Government's claims are offset and encouragement is given to "wider noncompliance" (*United States* v. *Ruzicka*, 329 U. S. 287, 293) by the frequently appreciable advantages contractors may anticipate from retaining their excessive profits pending litigation as to the appropriate interest rate.[3] Thus, despite the establishment of a 4% rate by the Act of March 23, 1951, Section 105(b) (2), 65 Stat. 7, 50 U. S. C. App., Supp. V, 1215(b)(2), there continues to be a pressing need for an authoritative determination by this Court.

2. The court below has erred in its holding that the Board, unquestionably empowered to determine the principal amount of a contractor's excessive profits, lacks power to fix an interest rate chargeable for failure or refusal to surrender such profits. This holding ignores and defeats the overriding congressional purpose to effect speedy, expeditious recapture of excessive profits; it dismisses as insignificant the evidence of congressional approval, by reenactment of the Act without change, of the administratively fixed interest rate; it substitutes dispersed, unpredictable, varying results, inviting litigation, for the certainty and unformity of a rule based upon informed administrative judgment.

[3] The present case is a perfect illustration. After retaining for almost five years the profits which had been found excessive, respondents litigated only the question of the interest rate to which the Government was entitled (R. 12).

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The Renegotiation Act in "its entire structure indicates the congressional purpose to have matters of renegotiation promptly and expeditiously settled; and to accomplish this as far as possible both by informal negotiations and by introducing the compulsion of finality at every stage * * *." *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 770. "The primary need for speed and definiteness in these matters" [4] can only be served by empowering the Renegotiation Board authoritatively to state the account for principal and interest due, thereby expediting collections by repayment, obviating the need for the Government to resort to litigation except in extraordinary cases, and taking the profit out of withholding excessive profits. The broad delegation could not stop short of the incidental, but essential, power to determine the amount due for interest.[5]

Plainly designed for summary recovery of excessive profits, not only to regain such sums for public purposes but to "eliminate" or deny them to the profiteering contractor,[6] the statutory plan is instinct with the rule-making power needed to make speedy

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[4] *Lichter* v. *United States*, 334 U. S. 742, 791.

[5] "* * * the power that creates the obligation can assign the measure of its delinquency—the detriment of delay in payment * * *." *United States* v. *Childs*, 266 U. S. 304, 308; *cf. Am. Iron Co.* v. *Seaboard Air Line*, 233 U. S. 261, 268. "* * * interest is a concomitant very nearly automatic." *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co.*, 245 N. Y. 1, 6.

[6] See the affidavit of Under Secretary of War Patterson, par. 7, reprinted in *Lichter* v. *United States*, 334 U. S. 742, 763, n. 7; *United States* v. *Strontium Products Co.*, 68 F. Supp. 886, 888 (S. D. W. Va.). By way of contrast, in tax cases, denial of the moneys to the taxpayer is not in itself a primary objective.

administrative collection a reality. *Cf. Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 258, n. 21. This power was plainly sufficient to justify the Board's adoption of a fixed rate of interest, preventing the uncertainties of case-by-case determination and precluding the delays of speculative litigation over the Government's funds.[7] For there is "a presumption against a construction that would render a statute ineffective or inefficient" (*Bird* v. *United States*, 187 U. S. 118, 124; *cf. United States* v. *Bailey*, 9 Pet. 238, 255; *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 213) and a corollary principle that "meaning, though not explicitly stated in words, may be imbedded in a statutory scheme." *United States* v. *Ruzicka*, 329 U. S. 287, 292; *cf. S. E. C.* v. *Joiner Corp.*, 320 U. S. 344, 350-351; *Helvering* v. *Gregory*, 69 F. 2d 809, 810-811 (C. A. 2), affirmed, 293 U. S. 465. Substituting strict "literalism" [8] for sympathetic effectuation of the legislative objective, the court below has failed to see that "we have here a typical case for upholding an administrative regulation." *United States* v. *Philmac Mfg. Co., supra*, at 520.

This conclusion is supported, not only by the clearly stated congressional purpose, but by the fact that Congress gave its tacit approval to the Board's interest requirement. *Ibid.* Before the extension of the Act on June 30, 1945, 59 Stat. 294, the House

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[7] The "central clue to the Board's powers" is "effectuation of the policies of the Act." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 191.

[8] See *United States* v. *Dotterweich*, 320 U. S. 277, 284; *Johnson* v. *United States*, 163 Fed. 30, 32 (C. A. 1).

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Committee considering it was repeatedly referred to the regulation calling for 6% interest.[9] Reenacting the Act without change, Congress demonstrated that it "knew what the administrative body was doing and did not itself do anything about it." *United States* v. *Philmac Mfg. Co., supra*, at 520. "If the legislative body had considered the [Board's] interpretation erroneous it would have amended the [Act]. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute." *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273. See also *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 500; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492-493.

3. The error of the court below is highlighted by the standards it invoked to justify substitution of a 3% interest rate for the 6% required by the Board's regulation. For one thing, the court observed (R. 23), the Government had not filed suit to recover respondents' excessive profits for over four years after the administrative determination. But this suggestion, suspiciously close to an untenable theory that the Government is estopped[10] or pun-

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[9] The existence of the regulation was called to the attention of the House Committee on Ways and Means by Under Secretary of War Patterson and the Chairman of the Board, copies of the regulation were furnished to members of the Committee, Congressman Eberharter specifically referred to the practice, and the National Association of Manufacturers, in recommending a change in the interest paid on refunds, drew the Committee's attention to the regulation. Hearings before Committee on Ways and Means on H. R. 2628, 79th Cong., 1st sess., pp. 17, 65, 92-93, 173, 222.

[10] *Cf. Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380.

ishable for the laches of its officials,[11] could have no relevance in any event. Wholly apart from the special protections available to the United States, the court has overlooked the dispositive fact that "responsibility for delay in payment rests quite as much upon the debtor, who is chargeable with knowledge of its own obligation and the breach of it, as upon the creditor." *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296. See also *United States* v. *United States F. & G. Co.,* 236 U. S. 512, 528. Ignoring the statutory objective, and emphasizing the delay in bringing suit rather than the the delay in payment, the decision below leaves out of account the role of interest in removing any profit or inducement to the debtor to continue to withhold. See *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co.,* 245 N. Y. 1, 5-6. The result is to put an unwarranted "premium on dilatory tactics * * *." *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 404.

Unlike the 3% rate adopted without explanation by the district court, the 6% required by the Board's regulation, while it is not punitive,[12] implements the congressional purpose by discouraging retention of

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[11] *Cf. Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132; *United States* v. *Summerlin,* 310 U. S. 414; *United States* v. *Thompson,* 98 U. S. 486. The absence of prejudice to respondents, who could never have had any doubt as to the Government's intention to insist on payment, dispels any conceivable predicate for laches. *Gardner* v. *Panama R. Co.,* 342 U. S. 29, 31.

[12] Both in Ohio, where this suit was brought, and in the District of Columbia, 6% is the legal rate of interest. Page's Ohio Gen. Code Ann. (1938) § 8305; D. C. Code (1940) § 28-2701.

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excessive profits. In sharp contrast with this overriding consideration, the court below found support for the district court's view in the fact that the Government, while respondents withheld its funds, "had adequate sources of credit through which it could obtain money at three per cent interest" (R. 23). It is argued, in other words, that renegotiation debtors should enjoy a forced loan from the Government, together with the benefit of the Government's credit rating. *Cf. Meilink* v. *Unemployment Comm'n,* 314 U. S. 564, 567. The argument omits entirely, not only the public injury where the objectives of the renegotiation program are thwarted (*cf. Yakus* v. *United States,* 321 U. S. 414, 440), but even the fact that the Government, while it receives the nominal interest rate from its debtor *less* the cost of servicing the claim for excessive profits, pays the nominal interest rate when it borrows *plus* the cost of floating and servicing its loan.[13] Thus, the assumed equivalence is an illusion from every point of view.

The fallacious grounds advanced to support the result below merely illustrate the propriety of the Board's uniform regulation, based upon concentrated administrative experience with the problems of renegotiation. In the scheme of the Renegotiation Act, the courts are not an integral part of the collection machinery, as they were under the Emergency Price Control Act. *Cf. Hecht Co.* v. *Bowles,*

[13] See *Meilink* v. *Unemployment Comm'n, supra,* at 567-568; Frank H. Knight, *Interest,* 8 Encyclopedia of the Social Sciences 131, 140-141.

321 U. S. 321, 331; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Their role in eliminating excessive profits is residual, stemming solely from the fact that recovery must be by suit where repayment or credit is impossible. Because litigation is dispersed, the courts have not gained specialized experience in fixing interest rates on renegotiation claims. Indeed, the judicial determination of the applicable interest rate is generally only perfunctory and incidental to the determination of more important questions. See *Laycock* v. *Parker*, 103 Wis. 161, 178. In this very case the district court took no evidence; it had the advantage of no knowledge or resources denied the Board; it gave no reason for its action (R. 12).

To require numerous suits in a great number of district courts merely to litigate the interest due on claims otherwise remitted to administrative determination is both wasteful and destructive of a centralized national program. The Board, by reason of its familiarity with the problem, is the agency most competent and strategically placed to develop a rule of broad general application for implementing the congressional policies. It should not be precluded from taking prompt and definite action by the ruling that, despite the congressional objects of "uniformity of administrative policy and disposition, expertness of judgment, and finality in determination," [14] the rate of interest was unaccountably excepted from the delegation to the Board [15] and left to be handled case by case in the courts.

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[14] *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 767-768.
[15] *Cf. American Power Co.* v. *S. E. C.*, 329 U. S. 90, 106.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 277.

THE UNITED STATES,
Petitioner,

v.

MORRIS ABRAMS and HOWARD ABRAMS,
Individually and as Co-Partners d.b.a.
Curtis Key Company,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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